Supreme Court, U.S.
FILED
JAN 24 1995
OFFICE OF THE CLERK

(3) (3)

Nos. 94-636 and 94-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

HILDA RODRIGUEZ and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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The opposition to these petitions never comes to grips with the central question of whether the government has the right to use the fugitive disentitlement doctrine in civil forfeiture actions where neither the claimants nor the property at issue are located in the United States. Instead, it spends most of its time chipping away at minor aspects of the claims filed by petitioners, leaving the basic question of governmental power unanswered. Because the question presented in both petitions persists, this Court should grant review.

1. Since filing the petition for *certiorari* in *Alvarez* last August, petitioners learned of the Seventh Circuit opinion in *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994), issued just before the petition was filed. The government states that the Seventh Circuit's decision "deepens a longstanding conflict in the circuits over the government's ability to invoke the fugitive disentitlement doctrine at all" to prevail in civil forfeiture cases. Opp. at 15-16. In fact, the Seventh Circuit's absolute rejection of the use of the doctrine in this context goes further than any prior opinion and creates a direct conflict with the decisions below and those of other circuits.

The Seventh Circuit held: "When applying the doctrine in government initiated civil forfeiture actions, the real injustice is that the government is allowed to confiscate property on mere allegation." 32 F.3d at 1155. Relying in large part on *Ortega-Rodriguez v. United States*, __ U.S. __, 113 S. Ct. 1199 (1993), *Hovey v. Elliott*, 167 U.S. 409 (1897), and other cases of this Court, the court of appeals found that use of the doctrine in this context raises significant constitutional questions. "Although a fugitive's conduct may be an affront to the court, it is a greater stain on our jurisprudence for the court in turn to discard those procedures that safeguard right and fair decisions." 32 F.3d at 1157. The court further recognized the significant procedural advantages enjoyed by the government in civil forfeiture actions, in which claimants bear the ultimate burden of proof. *Id.* at 1156. To afford claimants a hearing, the court found, "is only a slight burden on the government," *id.*, a burden which due process requires.

The Seventh Circuit's refusal to apply the fugitive disentitlement doctrine in a civil forfeiture proceeding, based on analysis of the case law and constitutional principles, stands in stark contrast to the Eleventh Circuit's rote application of that doctrine to dismiss the civil forfeiture

cases involved in these petitions. *Certiorari* should be granted to resolve the circuit courts' conflict on this issue.

2. Notwithstanding the undisputed conflict in the circuits, the government argues that the conflict should not be resolved here for two reasons. First, the government asserts that, because these petitions do not challenge the use of the doctrine in *all* civil forfeiture actions, but only in actions where neither the property nor the claimants are located in the United States, these petitions do not require resolution of the broadest conflict, and therefore are not appropriate vehicles for considering the issue at all. Opp. at 16. The conflicting views of the Eleventh and Seventh Circuits, however, are directly at issue in these petitions. Although the case before the Seventh Circuit did not involve the *in rem* jurisdictional issue presented in the petitions—and in fact, the Eleventh Circuit's cursory opinions below did not address the issue either—both circuits' decisions apply to a broad category of civil forfeiture cases that indisputably includes the cases at bar. That the facts here may also raise narrower questions about the use of the fugitive disentitlement doctrine does not eliminate the conflict or suggest that only the broader issue is worthy of review.

Second, in a confusing argument, the point of which seems to be that this Court should not consider the conflict in the circuits in ruling on these petitions, the government cites to footnote 5 in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). In that footnote, the Court ruled that an intervention issue that was not included in the question presented there, but was discussed in the merits briefs and argued, was not properly before the Court. A conflict in the circuits, however, is not an "issue," as that word is used in *Izumi*. Rather, it is a reason why a question presented may be certworthy. Sup. Ct. R. 10 (1994). And, as reinforced by the government's opposition, Opp. at 16-17, and *United States v. $40,877.59 in United States Currency*, it is a compelling reason here.

3. The government faults the petitions as "fact-specific challenge[s]." Opp. at 7. Indeed, the question presented does ask whether use of the fugitive disentitlement doctrine is proper in specific circumstances. The petitions do not, however, raise any issue as to the existence of the facts or raise factual disputes. Rather, the common question presented in both petitions is highly susceptible to repetition and raises important unresolved legal issues. Every case before this Court arises in a factual setting, but that does not render their legal issues unworthy of review.

4. The government argues that the question of jurisdiction in these cases is of "little continuing importance" in light of 28 U.S.C. § 1355(b)(2) (Supp. 1993), which granted subject matter jurisdiction to district courts over civil forfeiture actions regarding property outside the United States. Opp. at 15. The issue here, however, involves not *subject matter* jurisdiction but *in rem* jurisdiction. These two concepts are, of course, quite different. Accordingly, section 1355(b)(2) does not diminish the significance of the issue presented here. If anything, the authorization to proceed contained in section 1355(b)(2) makes the government's action in these cases even *more* likely to recur. Indeed, because the government is repeatedly bringing civil forfeiture actions in cases where both the property at issue and the claimants are located outside the United States, the question presented is increasingly significant.[1]

5. In an effort to establish that the district court had *in rem* jurisdiction over the civil forfeiture actions, despite the undisputed fact that the property at issue was located outside the United States, respondent equates the government's ability to obtain the cooperation of foreign governments with court control over the property. Opp. at 14. *In rem* jurisdiction, however, refers not to the ability of

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[1] Indeed, counsel of record is aware of at least 14 such cases currently pending in the district courts and Eleventh Circuit.

the Executive Branch to recover assets abroad, but to the *court's* power over those assets. In two of the decisions below, the district court itself questioned that power. Pet. 94-636 at 7a, 12a.

The Agreements cited, Opp. at 14, do not purport to grant the United States courts jurisdiction over property in the United Kingdom or Hong Kong, or to provide the courts control over such property. Moreover, the United Kingdom's cooperation in transferring assets after *default judgments*, on the condition that it receive half the proceeds, Opp. at 14 & n.9, hardly establishes the *in rem* jurisdiction of the district court. *In rem* jurisdiction is waivable, must be specifically challenged, and was probably not challenged in circumstances where a default judgment was entered. Rather, unlike the judgments below, default judgments in civil forfeiture actions usually occur in *uncontested* proceedings, where no claims are made to the property. *See* Fed. R. Civ. P. 55(a); Supp. R. Admir. A. Although the foreign banks agreed to freeze the assets at issue here, the opposition does not state, as it cannot, that either the United Kingdom or Hong Kong has agreed to transfer these *contested* assets to the United States.[2]

6. Further attempting to belittle the merits of petitioners' underlying arguments, the government asserts that "Petitioners have relied . . . on speculative allegations that the government acted in bad faith in seeking the separate criminal indictment . . . ." Opp. at 11. First, there is little question that petitioners made out a *prima facie* case of retaliatory indictment. No further proceedings were had on the issue, however, as a result of the government's invocation of the fugitive disentitlement doctrine. Absent the

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[2] Even if the district court had *in rem* jurisdiction over the funds that were actually transferred to Florida, the government concedes that several million dollars remain at issue, over which the court has no "actual or constructive control." Opp. at 12 n.7.

government's response, petitioners could do no more, since the government had control over all the evidence on this point. Second, the government never denied, in any of the numerous written submissions and oral proceedings before the district courts and appellate court below, petitioners' allegations regarding the government's motive in indicting petitioners.

The government also contends that the proper forum for challenging its motive in indicting petitioners "would be the criminal proceeding." *Id.* Yet it was the government which brought the civil forfeiture actions and which, after obtaining an indictment against the claimants in those actions, moved to dismiss their claims on the basis of the fugitive disentitlement doctrine. Thus, the government not only initiated the actions below, but it interjected the criminal cases into those actions after petitioners filed their claims. Having done so, to suggest that petitioners' oppositions to the government's motions to dismiss could not challenge the very basis for those motions is disingenuous, at best. Whether or not the issue of bad faith indictment is a possible defense in the criminal proceeding, the issue is nonetheless relevant as a basis for opposing the assertions of fugitive disentitlement made against claimants in these civil forfeiture actions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions for *certiorari* in these cases, the petitions for a writ of *certiorari* should be granted.

Respectfully submitted,

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January 24, 1995